

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,174

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Appeal of)

)

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying him coverage under medicaid for the purchase of a hearing aid. The issue is whether the Department's regulations limit medicaid coverage for hearing aids to persons under age twenty one.

FINDINGS OF FACT

In lieu of an oral hearing the parties submitted the following written Stipulation of Facts: ⁽¹⁾

1. The petitioner, [name], is a 65 year old recipient of Medicaid.
2. The petitioner is under the care and supervision of the Vermont Department of Mental Health and Mental Retardation and resides in a Residential Care Home.
3. On September 9, 1994, the petitioner, through his guardian, requested coverage of a hearing aid. The guardian's letter to the Department of Social Welfare (Department) is attached and incorporated into the record as Exhibit 1.
4. The petitioner's treating physician, [doctor], and his audiologist, [D. M.], MCHV Center for Disorders of Communication, certified that a hearing aid was medically necessary for correction of "moderate to severe bilateral sensorineural hearing loss". [Doctor's] medical necessity statement is attached and incorporated into the record as Exhibit 2. Audiologist [D. M.'s] Hearing Aid Evaluation is attached and incorporated into the record as Exhibit 3.
5. On September 29, 1994, the Medicaid Division denied coverage of a hearing aid for the petitioner based on the language of M § 650 which limits coverage of hearing aids to recipients under 21. The Department's determination is attached and incorporated into the record as Exhibit 4.

6. On October 20, 1994, the petitioner, through his guardian, requested this Fair Hearing.

7. On November 9, 1994, the petitioner, through his attorney, requested that the Department reverse his Medicaid coverage denial. The petitioner's letter is attached and incorporated into the record as Exhibit 5.

8. On December 7, 1994, the petitioner, through his attorney, again requested that the Department reverse his Medicaid coverage denial. The petitioner's letter is attached and incorporated into the record as Exhibit 6.

9. On December 12, 1994, the Department, through its attorney, responded that it did not dispute the petitioner's need for a hearing aid but declined to reverse its decision based on its position that hearing aids are not covered for Medicaid recipients over 21. The Department's letter is attached and incorporated into the record as Exhibit 7.

ORDER

The Department's decision is reversed.

REASONS

Medicaid Manual (MM) § M500 includes "audiologists' services" in the overall definition of "Hospital Services". Section M520 of the regulations includes the following definitions of "Outpatient Hospital Services":

Outpatient Hospital Services

"Outpatient hospital services" are defined as those covered items and services indicated below when furnished in an institution meeting the hospital services provider criteria (M500), by or under the direction of a physician, to an eligible recipient who is not expected to occupy a bed overnight in the institution furnishing the service.

Covered items and services include:

...

Rehabilitative therapies (physical, occupational, speech, inhalation) related directly and specifically to an active written treatment plan established and periodically reviewed by the physician. The plan must be reasonable and necessary to the treatment of the individual's illness or injury; rehabilitative therapies will be routinely covered for the first four months on physician certification. A written request for prior authorization to extend the period of treatment by the physician must be submitted to the Medicaid Division with pertinent clinical data showing the need for continued treatment, projected goals and estimated length of time. Unless there is another episode of acute illness, or increased loss of function, authorization will not be granted for more than one year from the start of treatment.

...

In this case the stipulated evidence indicates that the petitioner's hearing aid has been prescribed by a physician and is to be provided by an audiologist working in and for a hospital outpatient facility.

The Department appears to argue, however, that it has "opted" under the regulations not to provide services under the above provisions to "individuals with hearing disorders". Apparently, the Department's position is that because the words "audiological" or "hearing" do not appear in the parentheses that follow the words "rehabilitative therapies" in § M520, supra, audiological services are precluded.

The problem with such a reading, however, is that it is directly contrary to the Department's own "state plan", which sets forth to the federal Health Care Finance Agency (HCFA--the arm of the U.S. Department of Health and Human Services that administers and oversees states' participation in the medicaid program) the description of services the Department covers (and seeks federal reimbursement for) under its medicaid regulations. The Department's HCFA plan⁽²⁾ includes the following:

AMOUNT, DURATION AND SCOPE OF MEDICAL AND REMEDIAL CARE AND SERVICES PROVIDED TO THE CATEGORICALLY NEEDY

...

11. Physical therapy and related services.

a. Physical therapy.

X Provided: No limitations

X With limitations* Not provided.

b. Occupational therapy.

X Provided: No limitations

X With limitations* Not provided.

c. Services for individuals with speech, hearing, and language disorders (provided by or under the supervision of a speech pathologist or audiologist).

X Provided: No limitations

X With limitations* Not provided.

*Description provided on attachment (below):

ITEM II. PHYSICAL THERAPY AND RELATED SERVICES

a,b,c Physical Therapy, Occupational Therapy and services for individuals with speech, hearing and language disorders are limited:

- 1) to those provided in the outpatient department of a hospital or nursing facility; and by staff therapists of a home health agency or Visiting Nurse Association.
- 2) to 4 months duration from start of outpatient therapy unless prior authorization is granted for an extended time period;
- 3) to no coverage beyond 1 year unless there is another episode of acute illness or functional loss is demonstrably greater.
- 4) (to) service provided by an independently practicing therapist is not covered.

Clearly under the above plan, "services for individuals with . . . hearing . . . disorders" are included for medicaid coverage--subject only to the enumerated "limitations" (which also appear in MM § M520, supra⁽³⁾) regarding duration and provider qualifications. Indeed, this is wholly consistent with federal regulations, which provide that "physical therapy and related services" specifically include "diagnostic, screening, preventive, or corrective services provided by or under the direction of an . . . audiologist, for which the patient is referred by a physician . . . and includes any necessary supplies and equipment" (emphasis added). 42 C.F.R. § 440.110(c)(1); see also Meyers v. Reagan, 776 F.2d. 241 (8th Cir. 1985).⁽⁴⁾

In light of the state HCFA plan and the federal regulations, MM § M520, supra, cannot reasonably be read as excluding individuals with hearing disorders from medicaid coverage under "rehabilitative therapies"⁽⁵⁾, much less as a blanket prohibition on coverage for hearing aids. The Department maintains, however, that another section of the state regulations specifies such a blanket prohibition for individuals age 21 and over. The section in question, MM § M650, provides:

Hearing aids and examinations for prescribing or fitting them are covered for Medicaid recipients under age 21. Batteries and other maintenance items are not covered. Repairs required by normal use of the hearing aid are covered. Replacement is limited to one every three years. Prior authorization is required for each hearing aid or hearing aid service. The Medicaid Division in Waterbury receives requests for prior authorization.

By its plain meaning, § M650 certainly provides that individuals under age 21 are eligible for hearing aids (apparently without the limitations described in § M520, supra⁽⁶⁾). In light of the foregoing, however, § M650 cannot be read as prohibiting hearing aids for individuals over age 21 who, like the petitioner, have been prescribed such a device as part of "rehabilitative therapy" as described in § M520, the Department's HCFA plan, and the federal regulations (supra). Otherwise, it too would conflict with the state HCFA plan, which clearly provides that audiologists' services are covered, and with the federal requirement that such services include "necessary supplies and equipment".

The hearing officer assumes that for years the Department, apparently on the basis of § M650, has consistently and routinely denied medicaid coverage for hearing aids to individuals age 21 and over. It must be concluded, however, that this prohibition is neither mandated by a "plain reading" of that regulation nor consistent with the Department's HCFA plan and the federal regulations. In light of the fact that the petitioner in this case meets all the criteria of § M520, the Department's HCFA plan, and the federal regulations, it must be concluded that the Department has no legal basis to deny him medicaid

coverage for a hearing aid.

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1. Copies of the attachments to the parties' Stipulation and the written memoranda of law submitted by the parties were provided to the Board.
2. See attachments to Department's Memorandum of Law.
3. See also MM § M710.
4. The only written directive cited by the Department in support of its position that audiologist services are not covered for individuals age 21 and over is a portion of a separate HCFA manual furnished only to providers. The Department did not argue, however, that the provider manual is sufficient legal authority to override the state HCFA plan and the federal regulations.
5. The words in the parentheses in § M520 that follow the words "Rehabilitative therapies" must, therefore, be read as exemplary rather than exclusive. Otherwise, this section would be in conflict with the Department's HCFA plan and the federal regulations.
6. § M650 appears in the section of the regulations pertaining to "Physicians and Other Licensed Practitioners".